Center for Constitutional Rights

A NON-PROFIT LEGAL/EDUCATION ORGANIZATION COMMITTED TO THE CREATIVE USE OF LAW AS A POSITIVE FORCE FOR SOCIAL CHANGE.

March 31, 2003

Chief of Records
Attn: Request for Comments
Office of Foreign Assets Control
Department of the Treasury
1500 Pennsylvania Avenue NW
Washington DC 20220

Comments of the Center for Constitutional Rights on Proposed Rules, Department of the Treasury, Office of Foreign Assets Control, 31 CFR Parts 501 and 515: "Reporting and Procedures Regulations"; "Cuban Assets Control Regulations: Economic Sanctions Enforcement Guidelines," 68 Fed. Reg. 4422 (Jan. 29, 2003)

Introduction and Statement of Interest

The Office of Foreign Assets Control ("OFAC") has requested public comment on a set of proposed regulations, to be published as appendices to the Reporting and Procedures Regulations, 31 CFR Part 501, and to the Cuban Assets Control Regulations, 31 C.F.R. Part 515 ("CACR"). Under these regulations, OFAC prosecutes civil penalties against Americans who travel to Cuba in alleged violation of the terms of the economic embargo against that nation.

The Center for Constitutional Rights ("CCR" or the "Center") is in a unique position to comment on these particular rules. For many years the Center has represented and advised hundreds of individuals in various stages of the civil penalty process administered by OFAC for alleged violations of the CACR. On several occasions during that time, the Center has delivered testimony critical of the embargo before Congress.

We at the Center for Constitutional Rights continue to believe the embargo is ill advised, immoral and unconstitutional in that it infringes the right of Americans to travel freely and inflicts unnecessary economic hardship on the Cuban people. It also diverts government resources that are urgently needed to fight terrorism. Many members of Congress from both political parties agree that the policy makes no sense. Nonetheless, many of the comments below proceed by assuming that the CACR are designed with their stated underlying purpose—namely, preventing the flow of foreign exchange and other economic benefits into the Cuban economy. It is our position that, even assuming *arguendo* that this purpose is rational, the current proposed regulations are poorly tailored to meeting that goal.

The comments that follow proceed through the provisions of the proposed regulation seriatim, with overall conclusions following.

Background

This proposed rule states it is an "updated" version of OFAC's internal guidelines. In this regard, we note that CCR has, by letters dated June 21, 2001, requested information under the Freedom of Information Act ("FOIA") about enforcement guidelines used by OFAC and the Customs Service in prosecuting civil penalty cases under the CACR and determining whether to request reports (including completion of a Requirement to Furnish Information form ("RFI")) concerning travel to Cuba. OFAC has yet to respond to our FOIA request. Given that OFAC is now making public through this rule many current enforcement and proposed-penalty guidelines, we believe that OFAC can no longer justify its failure to release similar enforcement guidelines as they existed before January 29, 2003 pursuant to any of the FOIA exceptions (*e.g.*, that disclosure would reveal "guidelines for law enforcement investigations or prosecutions" risking circumvention of the law, 5 U.S.C. § 552(b)(7)(E)). To the extent that the new guidelines "supersede and replace internal Guidelines previously used by OFAC," CCR believes that OFAC should now disclose the older guidelines, either pursuant to CCR's FOIA request or in the interest of clarifying whether the new rule changes existing enforcement standards. (Such a voluntary clarification would be consistent with OFAC's policies favoring public disclosure of settlements, *see, e.g.*, 31 C.F.R. § 501.801, which purports to provide a frame of reference for prospective settlers, and thus to encourage settlement.)

APPENDIX TO PART 501—REPORTING AND PROCEDURES REGULATIONS

I. Enforcement of Economic Sanctions; Determination of Violation

It is evident throughout these proposed rules that one of their major goals is to maximize voluntary disclosure of violations to OFAC. (*See* III.B.1.(a), III.B.3.) We note that this might be aided by clearer public guidelines on *criminal* enforcement, or on the process by which OFAC decides to refer cases for criminal prosecution. It seems unlikely that any rational individual would voluntarily disclose facts that might indicate violation of the CACR (or other civil-penalty sanctions programs) knowing that they might also be subject to criminal prosecution based on their disclosures.[1] Since OFAC appears to be the agency that makes referrals for criminal prosecution (*see* I.C), presumably the criteria by which a case is deemed worthy of referral to the Justice Department are available to OFAC. Public disclosure of these criteria would almost certainly encourage many minor violators of sanctions programs to voluntarily disclose more information concerning possible prohibited transactions to OFAC.[2]

II. License Suspension and Revocation; Cautionary and Warning Letters

A. License Suspension and Revocation.

This section of the new Appendix to Part 501 would allow general license revocation due to recordkeeping violations (II.A.1, II.A.2), or due to "any other act or omission that demonstrates unfitness to conduct the transactions authorized by the general or specific license"

[1] Willful violations of the CACR may constitute criminal violations under the TWEA, 50 U.S.C. Appx. § 16.

[2] CCR requested such information through a FOIA request made of OFAC on June 21, 2001.

(II.A.5). We believe this change is not within OFAC's power under the relevant statutes. For example, the Cuban Democracy Act of 1992, Pub. L. 102-484, Section 1710, formerly codified at 50 U.S.C. App. § 16(b)(3) (1994), stated that penalties "may not be imposed for ... news gathering, research," or for reasonably limited "clearly defined educational or religious activities." While the Helms-Burton Act of 1996 repealed this provision, *See* 110 Stat. 785, § 102(d), it also froze the provisions of the CACR in place as they existed as of March 1, 1996. *See* 110 Stat. 785, § 102(h).[3] Presumably those provisions complied with the CDA at the time. It appears that the change proposed in the new rule would allow penalties to be imposed for various activities that were not punishable at the time of passage of the Helms-Burton Act, and therefore violates the statute.

Subjective fitness tests provide OFAC a cover with which it might impose ideological limitations on international travel, in violation of a line of Supreme Court decisions beginning with *Kent v. Dulles*, 357 U.S. 116 (1958). What procedures does OFAC intend to use in determining "unfitness to conduct ... transactions" otherwise licensed, in order to ensure fairness in this regard? While we believe this proposed "fitness" test is contrary to the statute and possibly unconstitutional, regardless of whatever precautionary measures OFAC institutes, we also believe that OFAC must make public disclosure of these determinations in order to allow the press and the public to ensure that "fitness" testing is not being implemented in a discriminatory manner.

C. Warning letters.

The proposed guidelines indicate that issuance of a warning letter (in lieu of a monetary penalty or proposed penalty) will only take place after a case-by-case determination of some sort. This appears to be inconsistent with the proposed Part 515 guidelines, where a warning letter is a general policy for certain categories of cases (for instance, for first-offense unlicensed visits to relatives; *see* Part 515 App. A.3), rather than a case-by-case determination (based on the likelihood of recidivism, the balance between the cost of prosecution and the enforcement benefit, or so forth).

1. Financial Transactions.

These provisions appear to show tremendous leniency for negligence in banking transactions, whereas strict liability appears to be the standard for individual travel. For example, (a) and (b) allow for mistake of fact defenses, (c) and (d) for basic negligence as a defense, (e) allows a mistake of law defense, and (f) allows OFAC to weigh the cost-benefit ratio involved in pursuing enforcement.

We see no reason why these sorts of defenses should be unavailable to individuals accused of engaging in unauthorized travel-related transactions. This is especially unfair given the fact that banking transactions invariably have a significant effect on the economy of a embargoed nation, whereas (in our experience) most individual travelers spend very little during their travel.

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[3] "Codification of economic embargo.—The economic embargo of Cuba, as in effect on March 1, 1996, including all restrictions under part 515 of title 31, Code of Federal Regulations, shall be in effect upon the enactment of this act, and shall remain in effect, [until a transitional government takes power in Cuba]."

We would be particularly eager to see OFAC apply a cost-benefit analysis to its travel related sanctions enforcement programs. If the cost-benefit ratio were any factor at all in OFAC's enforcement decisions, we believe that OFAC would eliminate its travel-related enforcement programs entirely, especially given the fact that OFAC also uses its limited resources to detect and block financial transactions of international terrorist groups.

III. Civil Penalties

A: Most Frequent Categories of Violations

1-3. Blocked Property, Imports and Exports, and Performance of Contracts:

Again, in these guidelines, the dollar value of the transactions involved is the benchmark for setting penalties for blocked asset transactions and prohibited importations, contracts and investments. Why is there no similar standard for setting penalties for individual travel-related violations—for instance, why are the penalties for CACR travel violations generally set at an amount absurdly out of proportion with the amount of money introduced into the Cuban economy?

4. Travel Related Violations.

This section mentions Iraq travel violations, which provide an interesting comparison to violations of the CACR. In our experience, $10,000 is a standard first-offense penalty for Iraq travel violations. Despite the fact that the Iraq Sanctions Regulations, 31 CFR Part 575, were rooted in part in United Nations sanctions enforcement and were promulgated during wartime, the actual penalties imposed by OFAC pursuant to the Iraq travel restrictions are hardly more severe than those meted out under the CACR guidelines. We are curious as to OFAC's justifications for this practice.

6. Requirement to Furnish Information [subsection (a)]

Failure to respond to an RFI "will result in a proposed penalty of $10,000, irrespective of whether any other violation is alleged." In *Leary v. United States*, 395 U.S. 6, 28 (1969), the Supreme Court invalidated a conviction under the marijuana tax statute, stating that "failure to obey a statute that required an incriminatory act" could not be punished, as this would inhibit the free exercise of the rights guaranteed by the Fifth Amendment. Similarly, we believe that the response demanded by OFAC's RFI requires incriminatory[4] acts, and therefore failure to respond to an RFI may not be punished.

Notwithstanding these constitutional objections, we believe the dollar amount of the proposed penalty for RFI non-compliance is unreasonably excessive. Certain substantive violations under the CACR are punished less severely, and the failures of recordkeeping

[4] Again, most violations of the CACR may constitute criminal violations under the TWEA, 50 U.S.C. Appx. § 16. Moreover, the civil penalties prosecutions themselves are quasi-criminal proceedings, akin to forfeitures, to which Fifth Amendment rights attach directly. *Cf. Boyd v. United States*, 116 U.S. 616, 634 (1886), *United States v. United States Coin and Currency*, 401 U.S. 715 (1971).

described in subsections (b) and (c) are punished less severely even though they are directed towards maintaining a benefit (*i.e.*, specific licenses and blocked asset transactions). While we feel that all civil penalties for travel-related violations are unconscionably large, the proposed penalties for noncompliance with RFIs strike us as particularly absurd,[5] and we invite OFAC to clarify its rationale for the imposition of such excessive fines.

Note that for *licensable but unlicensed* travel, punishment will already be increased if the traveler fails to disclose "evidence that the purpose of the travel fits within one of the category of licensable activities" prior to the issuance of the PPN under proposed App. to Part 515 Section A.4 (below). Presumably this disclosure would have taken place through the RFI. Therefore, in such circumstances the failure to complete the RFI would be doubly punished. We propose a method to eliminate this unfair result below (*see* comment on App. to Part 515, Section A.4).

B. Evaluation of Mitigating and Aggravating Factors.

1. Mitigation and mitigating factors.

This discussion states that "OFAC encourages evidentiary submission" presenting mitigation evidence.[6] For the reasons stated above, we feel it is inappropriate for OFAC to encourage voluntary submission of evidence that may be used in criminal prosecution (as all information about CACR violations may be). Moreover, we believe that OFAC, as the prosecuting agency in civil penalty proceedings (which are "quasi-criminal" proceedings) should not seek to encourage voluntary admissions of any sort, especially as the Congressionally-mandated hearing process is available to allow development of this evidence.

Turning to the individual mitigating factors listed, our comments follow:

(f) "Provision of a written response to a prepenalty notice": OFAC should clarify what exactly is intended by this phrase "written response," and whether the mitigation is applicable to CACR violations.

(j) "Lack of relevant *commercial* experience": We can see no reason why a *traveler's* ignorance of the law should not similarly be a mitigating factor in assessing penalties for travel-related violations.

(k) "Clerical error, inadvertence, or mistake of fact": Again, in our experience, mistake of fact, mistake of law, negligence, or recordkeeping defects (*e.g.* in relation to "fully hosted travel" under the CACR) have not generally been acknowledged as partial defenses for travel-related violations. While we have long felt that these factors should be available as full defenses in civil penalty proceedings, we applaud OFAC's decision to now allow them to function as mitigating factors.

(l) "Evidence in the administrative record that a transaction could have been licensed ... had an application been submitted": At what stage of proceedings may this material be introduced? OFAC should make this clear, since individuals

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[5] This is especially so given that OFAC has issued such penalties where a response to an RFI was made, but was submitted several days after the very short 20 business day period allowed for completion of the document. We believe this short time frame, coupled with the threats of criminal prosecution for noncompliance contained in the document, constitute an unconstitutional infringement on the free exercise of the recipient's Fifth Amendment rights.

[6] *See also* Mitigating factor (f), "Provision of a written response to a prepenalty notice."

determining whether to make substantive factual submissions (in response to an RFI or a PPN) will be balancing the risk of self-incrimination against the projected benefit in terms of mitigation of any civil penalty.

(m) "Apparent language barrier or other impediment to understanding of regulations (individuals only)": Again, this appears to be a "mistake-of-law" defense; does OFAC intend to make every mistake of law a mitigation factor? If not, at least in regards to the CACR, it appears that this mitigating factor may be specially designed to aid Cuban-Americans.

2. Aggravating factors:

We note with interest that "[e]*xtraordinary* adverse economic sanctions impact" (emphasis added) is the standard for aggravation. What is OFAC's justification for not including "de minimis adverse economic sanctions impact" as a mitigating factor? Numerous clients of ours accused of violating the CACR spent nothing more than the airport tax while in Cuba.

4. First offense:

In our experience, proposed penalties for non-response to an RFI (under the CACR) have not been mitigated by the 25% amount indicated in this section. Note that RFI-non-response penalties also do not increase sequentially, so the exception from this 25% minimum for penalties already distinguished by first and second offense does not apply.

The background to the regulations state that they serve both as a "deterrent" and have "a punitive purpose," 68 Fed. Reg. at 4423, but we strongly question whether the intent of Congress was to either deter or punish the exercise of Fifth Amendment rights. Again, under *Leary* there can be no imperative to comply with the standard RFI's self-incrimination requirement.

D. Settlement Prior to Issuance of Prepenalty Notice.

1. Initiating settlement.

This section sets forth a new 60-day hold procedure allowing settlement negotiations to proceed before the issuance of a prepenalty notice. Since settlements may be negotiated at any stage of the civil penalty process (*see, e.g.*, 31 C.F.R. § 515.708, and this proposed regulation, Part III.C, 68 Fed. Reg. at 4428), this procedure strongly implies that settlements prior to the PPN stage should be more favorable to the defendant than those in cases where OFAC has already issued a PPN. Yet in practice OFAC has proposed settlements for CCR clients at the RFI stage which are no more favorable than those proposed at the same time for PPN clients who have requested a hearing. What is OFAC's explanation for this inconsistency?

2. Settlement process.

This section states that, "[i]n informal settlement negotiations prior to the issuance of a prepenalty notice, OFAC will inform the party of the apparent violations OFAC intends to cite...." We note that, in our experience, OFAC has never provided prehearing discovery as

required by law[7] in cases where it is requested (in conjunction with a hearing request) in response to a prepenalty notice under the CACR, citing an inability to comply with the backlog of discovery requests in a timely manner. How is this policy consistent with the newly-set-forth policy of "inform[ing parties] of the apparent violations OFAC intends to cite" in the course of pre-PPN settlement negotiations?

F. Cancellation of proceedings:

This section would allow cancellation when evidence is submitted showing that "the party named did not commit or *is not responsible for* the violation," or when cancellation "is otherwise appropriate for policy or legal reasons."

As to the first category, the phrase "responsible" seems intended to exclude cases where legal responsibility is lacking, as distinct from cases where factual innocence ("did not commit") is asserted. We believe this would allow cancellation of penalties in all cases involving minors, limited mental capacity, *etc.* as well as all cases involving ignorance of the law or lack of *mens rea*. We invite clarification from OFAC.

As to the second category, we believe that any cancellations for "policy reasons" should be subject to individualized disclosure (at least concerning the nature of the policy or legal reason for cancellation). Such disclosure would be consonant with the policies underlying OFAC's recent rulemaking mandating disclosure of corporate settlement[8] (*e.g.*, ensuring the public that OFAC is enforcing the embargo in a fair and consistent manner), and with the goal of increasing the transparency of the agency generally.

APPENDIX TO PART 515—CUBA TRAVEL-RELATED AND CERTAIN OTHER VIOLATIONS OF 31 CFR PART 515

A. Traveler Violations

3. Unlicensed visits to close relatives:

Currently, the CACR allow a Cuban-American to visit relatives in circumstances demonstrating humanitarian need once per twelve-month period under a general license. Congress has determined that this once-in-12-months rule in the regulations should be permanently codified. The passage of the Helms-Burton Act of 1996, 110 Stat. 785, § 102(h), converted the provisions of the CACR as they existed at the time into statutory law ("Codification of economic embargo.—The economic embargo of Cuba, as in effect on March 1, 1996, including all restrictions under part 515 of title 31, Code of Federal Regulations, shall be in effect upon the enactment of this act, and shall remain in effect, [until a transitional government takes power in Cuba].").

Given that this is so, we fail to understand the rationale for punishing first offenses "involving unlicensed visits to close relatives" with a warning letter while travelers without relatives in Cuba are given a proposed penalty of $7,500 for first-offense unlicensed travel. The policy of issuing warning letters for only this category of offenses effectively rewrites the

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7 *See* 31 C.F.R. § 515.703(2).

8 *See* 31 C.F.R. § 501.801.

regulation to allow *two* visits per twelve month period. We believe this change violates the explicit terms of the Helms-Burton Act and is therefore in excess of OFAC's authority.

We note that the proposed guideline does not limit these "visits to close relatives" with the qualifier that the visits must occur "in circumstances that demonstrate humanitarian need," currently a precondition for a general license under 31 C.F.R. § 515.561(a). Again, this appears to have the effect of writing the qualifying language out of this regulation, which was codified into statutory law by Congress with the Helms-Burton Act. We would also question to what extent this travel without humanitarian justification constitutes "tourist activities" that neither "the Secretary of the Treasury, [n]or any other Federal official, may ... authorize ... either by a general license or on a case-by-case basis" under the terms of the Trade Sanctions Reform and Export Enhancement Act of 2000. *See* Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001 (Oct. 28, 2000), Title IX – Trade Sanctions Reform and Export Enhancement, § 901(b), *codified at* 22 U.S.C. § 7209(b) (defining "tourist activities" as "any activity with respect to travel to, from, or within Cuba that is not expressly authorized in ... this section" or the CACR as "as ... in effect on June 1, 2000"). While we believe that all restrictions on travel under the CACR are unconstitutional and poor public policy, we also believe strongly that whatever restrictions are imposed must be enforced in an evenhanded and non-discriminatory manner, without exceptions for particular ethnic groups.

Finally, the penalties for additional subsequent offenses involving visits to close relatives are diminished in relation to the penalties for other unlicensable travel, which makes it clear that OFAC regards this type of travel—again, not necessarily undertaken for humanitarian reasons—as a less serious violation than travel by persons without relations in Cuba. On its face, the double standard appears to be created not to further rational public policy purposes consistent with the embargo as a whole, but rather to court favor with a political constituency—Cuban Americans who are opposed to any general liberalization with regard to the embargo, but nonetheless desire the ability to visit relatives freely. We invite OFAC to correct this perception if it is inaccurate.

4. Licensable Transactions:

It seems obvious that OFAC expects that much of the "evidence that the purpose of travel fits within one of the categories of licensable activities" will be submitted prior to the PPN response, most likely in an RFI response. However, in our experience many travelers at the PPN stage have never received an RFI, and thus have never had the opportunity to mitigate their proposed penalty amounts with a formal submission prior to PPN stage. Does OFAC intend to make some formal, post-PPN process available to travelers who engaged in "licensable" but unlicensed transactions? Additionally, as RFI completion may not legally be compelled (under *Leary v. United States*, as described above), we believe the absence of such a formal submission process effectively punishes those who refuse to complete the RFI for the exercise of their Fifth Amendment rights.

We note in passing that there is no requirement that the "evidence" of licensability be voluntarily supplied by the traveler.

It seems inconsistent to punish a *licensable* first trip after a warning letter more heavily ($10,000) than an *unlicensable* first trip after a warning letter ($7,500), unless the fact that the second violation took place *after notice* is considered the principal aggravating factor. If notice is

in fact the touchstone for the higher fines (rather than a strict-liability notion that all second offenses are inherently more culpable), we are uncertain why OFAC has chosen, on occasion, to send out penalty notices for multiple unlicensed trips which have proposed penalties for second and subsequent trips of $10,000 per trip. It seems to us that when a second unlicensable offense is noticed at the same time as the first offense, the proposed penalty ought to be the same for each trip.

5. Export of funds:

In all likelihood, no "tourist travelers" will have injected $7,500 (the amount of a typical proposed penalty for first offense travel-related transactions) into the Cuban economy. If the purpose of the CACR is regulatory (*i.e.*, to keep Americans from supporting the Cuban economy and thereby prolonging the life of the current regime) and not punitive (to punish a certain class of traveler) then what is the justification for tying the proposed penalty amounts for funds transfers to the size of the transfers in question, while the same is not done for travel-related transactions? This guideline again appears to allow relative leniency in a category of offense most likely to be engaged in by Cuban Americans; again, we invite OFAC to correct this perception if it is inaccurate.

6. Use of a credit card in Cuba:

It is unclear to us why the use of a credit card in Cuba should be so heavily punished. There appears to be no justification for imposing a separate penalty for the use of the card, especially a penalty whose amount is unrelated to the size of the transaction in question. (In this regard, we note that the actual size of the transaction will be a matter of record when a credit card is used, and OFAC may be able to discover this in the course of prosecuting a specific unlicensed transaction.) Also, we fail to understand OFAC's justification for tying such penalties to the number of trips involving use of a credit card rather than the number of uses of a credit card. As it stands the proposed guideline appears to be a means to punish casual travelers who end up using credit cards for small incidental expenses because they have not planned their trips in advance. It would also tend to punish travelers who honestly do not understand that their travel-related transactions are prohibited under the regulations, since presumably only such travelers would use a method of payment which generates a discoverable record.

B. Travel, Carrier and Remittance Services

Proposed penalties for unlicensed remittance forwarding providers are lower than for unlicensed travel service providers or unlicensed carrier service providers. Yet the former results, presumably, in a greater influx of hard currency into the Cuban economy. This guideline again appears to allow leniency in a category of offense most likely to be engaged in by Cuban Americans; again, we invite OFAC to correct this perception if it is inaccurate.

CONCLUSIONS

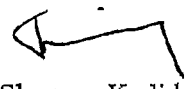
Viewing these proposed regulations as a whole, a number of patterns emerge. First, the proposed regulations allow financial institutions and businesses numerous defenses that are unavailable to individuals engaging in travel-related transactions. We believe that the defenses (and mitigation factors) of mistake of law, mistake of fact, negligence, and so forth ought to be available to individual defendants in civil penalty proceedings for alleged travel-related violations.

It is difficult to escape the conclusion that the enforcement guidelines would serve to disproportionately punish Americans who are not of Cuban ethnic descent for transactions that have the same effect on the Cuban economy as those carried out by Cuban-American visitors. Unequal enforcement of the travel restrictions based on the national origin of the traveler raises even more serious constitutional objections than the travel restrictions themselves. In a similar vein, we are deeply disturbed by the proposal to allow amorphously defined "fitness testing" of travelers—even those under a general license. To allow an administrative agency such as OFAC to make such determinations without public oversight would threaten to unravel fundamental constitutional rights that were established by the Supreme Court more than four decades ago.

Much in these new guidelines appears to circumvent the express will of Congress, as announced in three major statutes over the last eleven years. To the extent that these proposed regulations have the effect of altering the Helms-Burton Act's codification of Cuban Democracy Act-compliant regulations as they stood in 1996, or the Trade Sanctions Reform Act's restrictions on OFAC's endorsement of certain travel transactions, the agency is acting in excess of its congressionally-delegated powers.

Finally, we would like to reiterate our unequivocal opposition to the Cuban embargo on moral, public policy and constitutional grounds, and to the use of OFAC enforcement resources in pursuit of CACR violations, which is damaging to the national security of the United States. We look forward to OFAC's response.

Respectfully submitted,



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